Supreme Court, U.S.
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No. 97-1891

In The

Supreme Court of the United States

October Term, 1997

JAMIE BABICZ, JENNIFER BABICZ, BY AND THROUGH THEIR PARENTS AND FRIENDS, JEROME BABICZ AND JOYCE BABICZ, JEROME BABICZ, INDIVIDUALLY, JOYCE BABICZ, INDIVIDUALLY,

Petitioners,

v.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, FRANK PETRUZIELO, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE BROWARD COUNTY PUBLIC SCHOOLS, DANIEL O'KEEFE, IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF RAMBLEWOOD MIDDLE SCHOOL, A BROWARD COUNTY PUBLIC SCHOOL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents restate the questions as follows:

1. Whether the claimants must first exhaust their administrative remedies under Title 20 U.S.C. Section 1415(f) of IDEA before presenting federal claims asserting the denial of free and appropriate publicly financed special education under Section 504 and the Americans with Disabilities Act (ADA).

2. Are Petitioners' claims that they were denied a free and appropriate publicly financed special education in middle school moot, where Petitioners are currently receiving services in high school under a different 504 Plan?

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STATEMENT OF THE CASE

Petitioners, Jamie Babicz and Jennifer Babicz, through their parents, filed a suit in the United States District Court for the Southern District of Florida against Respondents, The School Board of Broward County, Florida, ("The School Board"), Dr. Frank R. Petruzielo, Superintendent, and Mr. Daniel O'Keefe, the Principal of Ramblewood Middle School. Petitioners claimed that The School Board denied equal educational opportunities on account of their asthmatic condition, and retaliated against the parents for claiming certain rights on behalf of their daughters. Both students attended Ramblewood Middle School. Presently both students attend school at Taravella High School. The Babiczes sought relief pursuant to 42 U.S.C. § 1983, Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134.

Respondents moved to dismiss the Complaint based on Petitioners' failure to exhaust administrative remedies as required under IDEA, 20 U.S.C. § 1415(f). The district court dismissed the complaint on that basis, and the Eleventh Circuit affirmed. This petition for a writ of certiorari followed.

The district court accepted the following facts as true as alleged in the Complaint:

1. Jamie Babicz is a fourteen year old eighth grade student in the gifted program at Ramblewood Middle School. Jennifer Babicz is a twelve year old seventh grade

student at Ramblewood Middle School. They are qualified persons with disabilities within the meaning of Section 504 and the ADA.

2. Jamie and Jennifer have been diagnosed since they were toddlers with chronic asthma, a respiratory illness which affects their breathing and lung capacity. Due to asthma attacks, they miss a significant amount of school, which in turn affects their learning. In addition, Jennifer suffers from allergies and sinusitis and Jamie suffers from allergies and migraine syndrome.

3. The Babiczes informed the District that both girls' asthma resulted in frequent and sporadic absences and that they would need accommodations to keep up with their class work and to medically manage their asthma while they were at school.

4. The Babiczes requested that the School Board design a formal plan of accommodations and modifications, referred to as a Section 504 Plan, tailoring the plan that had been followed at their previous school in Maryland.

5. The School Board recommended that Mrs. Babicz complete an application for the School Board's Intermittent Hospital/Homebound program. In this program the instruction in core academic subjects is delivered by telephone at specified times during the day.

6. Jennifer was enrolled in the Intermittent Hospital/Homebound program for the 1994-95 school year but never accessed the program. Jamie's Plan included no provisions for sending home homework assignments and

tests during absences. The Plan is prepared with the input of the parents.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied for several reasons: (1) this Court has no jurisdiction over the claims because the claims are moot; (2) the Eleventh Circuit decision is consistent with this Court's decisions and the decisions from other circuits; (3) the remedies pursuant to IDEA are not futile, therefore, petitioners are not exempt from the administrative exhaustion requirements of IDEA. The courts below properly determined that the Individuals with Disabilities Education Act ("IDEA"), formerly known as the Education of the Handicapped Act ("EHA") 20 U.S.C. §§ 1400 *et seq.*, is the exclusive avenue through which Petitioners must present their federal claims regarding the denial of free and appropriate publicly financed special education.

1. PETITIONERS' CLAIMS ARE MOOT

The basis of the mootness doctrine is to ensure that the courts review only those claims that present live disputes. *Allen v. Wright*, 468 U.S. 737 (1984). A claim will be moot if "changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." 13A Charles Alan Wright *et al.*, Federal Practice and Procedure § 3533.3 at 261 (2d ed. 1984).

When this case was filed, both students attended Ramblewood Middle School. Presently both students

attend Taravella High School. The 504 Plans that were prepared for the students in Middle School and which the students claimed were not being followed are no longer in place or binding. Presently, the students have different plans in high school. The students no longer have an interest in the issues raised in the district court; there is no live controversy between the parties. Thus, the issues that were raised in the district court are now moot and this Court has no subject matter jurisdiction over the case.

2. THE ELEVENTH CIRCUIT DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS AND THE DECISIONS OF OTHER CIRCUITS

The plain language of IDEA mandated the results in the district court and the Eleventh Circuit. The statute states:

> (f) Effect on other laws
>
> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.] or other Federal statutes protecting the rights of children and youth with disabilities, *except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.*

20 U.S.C. § 1415(f) (emphasis added). The plain language indicates that a Plaintiff seeking relief that is also available under IDEA, shall exhaust the procedures available under IDEA. The section contains no exceptions. In this case, Petitioners alleged that their rights to "equal educational opportunities" were violated and they sought to have consistent and complete implementation of the Plans. That relief is available under IDEA. Petitioners also sought compensatory damages which are not available pursuant to IDEA. However, the court in *Waterman v. Marquette-Alger Intermediate School District*, 739 F. Supp. 361 (W.D. Mich. 1990) held, "[t]he fact that plaintiffs seek a particular type of relief . . . not available under the EHA . . . is immaterial. To hold otherwise would allow EHA plaintiffs to frustrate congressional purpose by bypassing the administrative process in virtually every case containing EHA, section 504, or section 1983 damages claims." *Id.* at 365; *Association For Retarded Citizens of Alabama, Inc. v. Teague*, 830 F.2d 158, 161 (11th Cir. 1987) (same holding). The right of parents to pursue judicial remedies for their disabled children is conditioned upon the exhaustion of IDEA's administrative procedures. *Id.* Generally claims such as Petitioners' claims pursuant to 42 U.S.C. § 1983 are subject to the requirement of exhaustion of IDEA's administrative procedures. *Smith v. Robinson*, 468 U.S. 992, 1019 (1984). *Manecke v. School Board of Pinellas County, Florida*, 762 F.2d 912 (11th Cir. 1985) (Section 1983, § 504 and the ADA may not be brought until administrative remedies are exhausted); *accord Charlie F. v. Board of Education of Skokie School District*, 98 F.3d 989 (7th Cir. 1996) (holding same for § 1983, § 504 and ADA);

W.G. v. Senatore, 18 F.3d 60 (2d Cir. 1994) (holding same for § 1983 and ADA).

Petitioners also argue vaguely that this case is in conflict with this Court's decision in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984) but never identify why that is so. This Court held that "§ 504 is inapplicable when relief is available under Education of the Handicapped Act to remedy a denial of educational services." *Id.* at 895. This is the same conclusion the lower courts reached in this case. Therefore, there is no conflict between the decisions. In *Tatro*, this Court also held that clean intermittent catherization is a related service as defined by IDEA. The Court noted that only those services necessary to aid a handicapped child to benefit from special education must be provided. *Id.* In this case, the School Board provided Petitioners with a Plan which assisted the students with their class work and which medically managed their asthma while at school. The Intermittent Hospital/Homebound program and other modifications qualify as "related services" pursuant to IDEA because these modifications helped Petitioners benefit from special education.

In addition, the decision below is consistent with the decisions from other Circuits which have dealt with the same issue. As in *Charlie F. v. Board of Education of Skokie School District*, 98 F.3d 989 (7th Cir. 1996), Petitioners are only attempting to present their claim as one pursuant to Section 504 of the Rehabilitation Act or the ADA to bypass the administrative requirements of IDEA. The court in *Waterman v. Marquette-Alger Intermediate School D.*, 739 F. Supp. 361 (W.D. Mich. 1990) stated "EHA exhaustion must occur before plaintiffs may file an action

under any other federal law seeking relief that is also available under the EHA." *Id.* at 365. The case also stated that "[i]n the present case, plaintiff's actions under section 504 of The Rehabilitation Act and Section 1983 seek relief that is also available under the EHA." *Id.* Likewise, the Babiczes sought relief which is also available under IDEA. Moreover, the Eleventh Circuit's ruling is consistent with *Hope v. Cortines*, 872 F. Supp. 14 (E.D.N.Y 1995). As in *Hope*, "[i]n an apparent attempt to circumvent section 1415(f), the [brief] asserts – despite the complaint's allegations detailing the extensive history of special education services sought for and received by [Petitioners] – that 'plaintiff does not need nor desire special education.' " *Id.* at 21. Petitioners, as Plaintiffs in *Hope*, have an extensive history of documented disabilities and special services provided by the School Board as detailed in the Complaint. As in *Hope*, "[Petitioners] thus cannot escape IDEA's exhaustion requirement by drafting a complaint artfully avoiding an IDEA claim where IDEA offers the very relief they seek." *Id.* at 17.

3. THE REMEDIES AVAILABLE PURSUANT TO IDEA WERE NOT FUTILE IN THIS CASE

The administrative remedies in this case were not futile because the Petitioners could have received adequate relief had they timely pursued the administrative avenues. IDEA is the only statute specifically created to address the educational rights of children with disabilities. *Smith v. Robinson*, 468 U.S. 992, 1019 (1984); Title 20 U.S.C. § 1400 *et seq.* Petitioners, by their own admission,

fit the definition of "disability" pursuant to IDEA. *Appellants' Brief* at 12, *Petition for Writ of Certiorari* at 4. Taking the facts in the Complaint as true, Petitioners received special education and related services in the form of Intermittent Hospital/Homebound program and other special accommodations and modifications as specified in the 504 Plans. They complained that the School Board's failure to follow the Plans resulted in the children not obtaining a free and appropriate publicly financed special education. If the administrative remedies had been exhausted, an administrative law judge could have determined whether the School Board was in violation of the Plans and ordered the School Board to make appropriate adjustments if any were required. Petitioners had the obligation to assert their claims to a free and appropriate public education under IDEA before they reach the court system. A procedure that may result in any substantial relief is not futile. *N.B. v. Alachua County School Board*, 84 F.3d 1376, 1379 (11th Cir. 1996).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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